

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

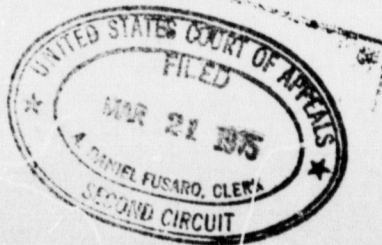
JOHN ZITO, individually  
and on behalf of all others similarly  
situated - Plaintiff

VS.

CASPAR WEINBERGER, individually  
and in his capacity as Secretary of  
Health, Education & Welfare - Defendant

PLAINTIFF - APPELLANT'S BRIEF

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ISSUES PRESENTED FOR REVIEW

1. WHETHER THIS CASE IS MOOT AS TO THE NAMED PLAINTIFF DUE TO THE REMOVAL OF HIS FINANCIAL INTERESTS SUBSEQUENT TO THE COMMENCEMENT OF THE SUIT.
2. WHETHER, IF HIS INDIVIDUAL CLAIM IS MOOT, THE NAMED PLAINTIFF MAY CONTINUE TO PROSECUTE THIS ACTION ON BEHALF OF THE CLASS.



### STATEMENT OF THE CASE

The complaint in this action was filed in July 1974. The named plaintiff, John Zito, a recipient of Social Security benefits, was receiving a reduced level of benefits in order that the Social Security Administration might recoup an alleged overpayment.

In his complaint, Mr. Zito alleged that prior to any reduction in his benefits he should have been afforded an opportunity for an oral hearing at which he would have the opportunity to personally present evidence to show that, the recoupment was improper because there was no overpayment to be recouped and he was entitled to have any overpayment waived pursuant to §204 (b) of the Social Security Act. It was alleged that the failure to provide a hearing violated the Due Process clause of the Fifth Amendment.

Jurisdiction was sought under 28 U.S.C. § 1361, the federal mandamus statute. The action was brought on behalf of Mr. Zito and all social security recipients whose benefits were subject to recoupment by the Social Security Administration.

The plaintiff sought an injunction preventing further reductions in his benefits. In addition he sought a declaratory judgment and an order of mandamus requiring that hearings be held prior to any recoupments. ( Plaintiff's complaint pp.586).

After the commencement of this action, the amounts which had been deducted from plaintiff's benefits were restored. In a settlement of plaintiff's claim for a Temporary Restraining Order and Preliminary Injunction the Plaintiff and Defendant signed an agreement in which the Department of Health Education and Welfare (which supervises the Social Security Administration, hereinafter H.E.W.) restored plaintiff's benefits to their full level and agreed to defer any future action regarding recoupment until a decision had been reached as to whether the plaintiff was entitled to have the overpayment waived.

It was expressly stated in this agreement that the Defendant's claims as to the validity and legality of its procedures was in no way prejudiced. (Agreement Re: Temporary Restraining Order and Preliminary Injunction pp. 1 & 2).

After this agreement was filed, plaintiff moved for certification as a class action and the defendant moved to have the action dismissed.

On November 15, 1974, Judge Jon O. Newman granted defendant's motion to dismiss on the grounds that the case was now moot and that John Zito was no longer a proper representative of the class.



## ARGUMENT

1. WHETHER THIS CASE IS MOOT AS TO THE NAMED PLAINTIFF DUE TO THE REMOVAL OF HIS FINANCIAL INTERESTS SUBSEQUENT TO THE COMMENCEMENT OF THE SUIT

It is the contention of the Court below that John Zito's claim of a constitutional right to an oral evidentiary hearing was rendered moot when the factual dispute over the amount of benefits to which he was entitled was terminated by H.E.W.'s abandonment of further attempts to recover any alleged overpayments. (Ruling on Defendant's Motion to Dismiss p.2).

This decision does not give sufficient consideration to the gravamen of the Plaintiff's complaint. This case is not an appeal from an administrative decision regarding the correctness of the agency's actions with respect to this particular recoupment, rather it is a claim for broad relief from procedures which deny all social security recipients a fundamental constitutional right, the opportunity for a due process hearing prior to any adverse action with respect to their benefits.

This case is distinguishable from Whitehead v. Richardson 446 F.2d 126 (6 Cir. 1971) where suit was brought to review an administrative decision denying disability benefits. The Secretary of H.E.W. had the case remanded to his office and after his decision to award all of the claimed benefits the case was dismissed as moot.

In the case at bar, although the existence of the overpayment is denied, the relief sought goes far beyond that narrow issue. The Plaintiff has sought a declaratory judgment and an order in



in the nature of mandamus enforcing plaintiff's right to a due process hearing.

A finding of mootness is not proper when the suit contains allegations that the defendant has established unconstitutional practices merely because the defendant has settled the particular dispute of the named plaintiff without reforming the allegedly unconstitutional practices. Voluntary cessation of illegal conduct is not grounds for mootness unless the defendant can bear the burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated." U.S. v. W.T. Grant Co. 345 U.S. 629, 73 S Ct. 894, 97 L Ed. 1303 (1953).

The constitutional issue in this case was squarely before the court in the Plaintiff's complaint. The defendant raised no questions of ripeness or jurisdiction of the subject matter. In such a situation the decisions hold that dismissal by reason of mootness is not warranted where the defendant concedes the immediate dispute but refuses in the future to abandon the challenged practice.

Gray vs. Sanders 372 US 368, 83SCT. 801 9 L Ed. 2d 821 (1963), placed a somewhat similar question before the Supreme Court. That suit challenged the use of a county unit system of voting as opposed to the popular vote basis which the Court had & Previously held was constitutionally required.

Subsequent to the filing of the lawsuit an election was held

on a popular vote basis. The Court ruled that this fact was not sufficient to justify dismissing the case on the basis of mootness as the statute which established the county unit system was still in effect and would govern future elections.

Voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing.

Gray v. Sanders, supra, at 376.

In this case there has not even been the voluntary abandonment of the challenged practice. All the Defendant has done is to cancel John Zito's financial interest in this suit by exercising its power to waive its right to claim an overpayment.

The lower Court recognizes that the granting of a post-reduction or even a pre-reduction hearing would not be sufficient to moot this action even if the decision were favorable to the plaintiff, if there were no admission that such a hearing is constitutionally required. Although the lower court claims that "H.E.W. has gone further" (Ruling on Defendant's Motion to Dismiss p.2), in fact the Defendant has not even gone as far as voluntarily abandoning the challenged conduct. In return for dropping the named plaintiff's claim for preliminary relief, further reduction of his benefits was deferred until further reconsideration was given the case by the defendant. In this agreement it was expressly stated by the defendant that all of its procedures were valid and proper.

Some weeks later the named plaintiff, John Zito was notified that the Social Security Administration waived its right to



recover the alleged overpayment. Thus, while continuing to deny that a right to a hearing existed, the defendant had in its power, by virtue of the lower courts decision, the power to have dismissed any challenge to its right to deny such a hearing.

The removal of the particular threat or danger which initially prompted the filing of the lawsuit is not sufficient to warrant dismissal on the grounds of mootness.

In a case where a stockholder brought a derivative suit to challenge a proposed merger and alleged a violation of the laws prohibiting interlocking directorates, the plans for the merger were abandoned and the offending directors resigned. The Court, however, refused to dismiss the case as moot since one corporation owned a majority of the outstanding stock of the other "the climate for repetition of challenged conduct exists as it did before commencement of plaintiff's lawsuit." Treves v. Servel Inc. 244 F. Supp. 773,777 (S.D.N.Y. 1965).

In the case at bar for more than a mere climate exists as the Defendant has continually refused, through the course of these proceedings to accede to any of plaintiff's claims of law. Under the lower courts ruling the Defendant has the power to thwart any future challenges to its practice by merely waiving its claims against the named plaintiff's. This creates a situation where the conduct complained of is "capable of repetition yet evading review." It has long been held that a claim of mootness in such cases will not prevail. Southern Pacific Term Co. v. ICC 219 U.S. 498, 31 S. Ct., 279, 55

L Ed.310 (1919). Moore v. Ogilvie 394 U.S. 814,89 S. Ct.  
1493, 23 L. Ed. 2d 1 (1969).

For these reasons the lower court was in error in ruling that the Defendant's actions were sufficient to moot the Plaintiff's claim, and should be reversed.



2. WHETHER, IF HIS INDIVIDUAL CLAIM IS MOOT, THE NAMED PLAINTIFF MAY CONTINUE TO PROSECUTE THIS ACTION ON BEHALF OF THE CLASS.

The decision of the lower court holds that by exercising of it's power to waive any and all claims against the named plaintiff, the defendant has terminated his status as a proper representative of the class and justified the dismissal of this action. John Zito can no longer represent the class in this action as he is "lacking... in adversity." (Ruling on defendant's Motion to Dismiss p.4.).

This holding contravenes a substantial body of authority preventing the dismissal of class actions on substantial constitutional questions by the elimination of part or all of the named plaintiff's personal interest in the lawsuit.

Where a welfare applicant challenged the constitutionality of a statute denying her assistance and subsequently was granted such assistance in spite of this statute, federal district court refused to dismiss the action as moot and remove plaintiff as a proper representative of the class. Gaddis v. Wyman 304 F. Supp. 713 (S.D.N.Y. 1969)

On the point of whether the sole named plaintiff continued to be a proper representative of the class, the opinion of the court was especially pertinent:

The contention [that the case is moot] rests upon the assumption that in order to have a class action at least one named plaintiff must continue to be representative of the purported class. Since Gaddis, the only named plaintiff, is no longer a representative of that class, defendant argues that the entire action must fall. When the action was commenced, however, Gaddis was properly a representative of the purported class. To say that



the whole action is mooted simply because it may be moot as to the named plaintiff would be contrary to the expressed purpose of Rule 23 (e), which prohibits dismissal or compromise of a class action if the result would be to injure the other members of the purported class.

Defendants are not aided in their argument by the fact that a court has never determined that a class action in fact exists, for "during the interim between filing and the 23 (c) (1) determination by the court, it must be assumed to be a class action for purposes of dismissal or compromise under 23 (c) unless and until a contrary determination is made under 23 (c) (1) ...."

(304 F. Supp. at 714-15).

In the Gaddis case motions to intervene had been filed on behalf of additional prospective plaintiffs. In that case, however, plaintiff's counsel had conceded that the status of the named plaintiff was seriously affected due to her receipt of benefits as her eligibility for such benefits was the primary question the lawsuit was to decide. In the instant case the ultimate question to be decided is not the receipt or denial of benefits but the constitutionality of the procedures by which such a receipt or denial is determined.

The presence or absence of intervenors in this suit is not major importance for the reason that if the judgment of the lower court is upheld the presence of additional plaintiff's or intervenors is irrelevant as the defendant is given the power to moot, in the same manner, the individual claims of additional plaintiffs as well.

The right of a named plaintiff who had received some individual relief to continue as a representative of the class was strengthened by Torres v. New York State Department of Labor 318 F. Supp. 1313 (S.D.N.Y. 1970). This suit sought to establish a constitutional

right to a due process hearing prior to the termination of unemployment compensation benefits. Even though the named plaintiff ultimately received a hearing the court refused to dismiss the suit because of mootness or the named plaintiff's lack of standing. The court held that the hearing provided to the plaintiff was insufficient as it was held after rather than before the termination. On the question of the named plaintiff's continued standing the court's opinion continued:

In a sense, Torres' status as of the time he brought this action could never be changed and could lead neither to mootness nor to his being unrepresentative. Giving Torres a hearing following the termination or his benefits cannot alter the fact that he was declared ineligible and deprived of unemployment compensation benefits before he was given a hearing. Thus, his status as a representative of other who are subjected to a pre-hearing termination has not changed.

318 F. Supp. at 1317

In this case the named plaintiff is making a very similar claim, namely that his status, as of the time this action was brought, cannot be altered by the unilateral action of the Defendant. Especially where the basic question which this lawsuit was brought to resolve goes undecided. The defendant's waiver of any claims it may have cannot change the fact that plaintiff was refused a due process hearing prior to defendant's original decision to recoup.

This question of standing was once again faced in Frost v. Weinberger 375 F. Supp. 1312 (E.D.N.Y. 1974). In that suit the plaintiff sought relief identical to the relief sought in this case, namely the right to an oral evidentiary hearing prior to a reduction or termination of Social Security benefits. In that case the named plaintiff was actually provided with the evidentiary



hearing requested in the complaint. With full knowledge of this fact the Court refused to dismiss the class action either on the basis of mootness or the named plaintiff's lack of standing. The opinion of the court on this point is especially relevant.

The defendant, rather than showing that other recipients of survivors' benefits will be accorded different treatment in futuro, has steadfastly clung to the correctness of the position that the administrative procedure currently in force are in total compliance with the requirements of due process. There are numerous recipients who are members of the class who have already had their award of benefits reduced without a hearing or who are still subject to the same administrative treatment ...

Similarly, it is not a valid argument to claim that because the plaintiffs have received a post-reduction hearing, they are no longer members or proper representatives of the class ...

Since the plaintiffs were proper members of the purported class at the commencement of this action, any subsequent mootness of their individual claims will not affect their right or ability to continue litigating the case on behalf of the class. See, e.g., Thomas v. Clarke, 54 F.R.D. 245, 252 (D. Minn. 1971); Gatling v. Butler, *supra*, 52 F.R.D. at 395. 375 F. Supp at 1318, 1319

The record in this case clearly shows its similarity with the issues decided in Frost and the same policy reasons for not dismissing the class action still apply.

While the court below has recognized some of the principles recited above including Gatling v. Butler<sup>1.</sup> the court reached the conclusion that the controlling decision was Norman v. Connecticut State Board of Parole 458 F. 2d 497 (2 Cir 1972). (Ruling on defendant's Motion to Dismiss p. 3)

Briefly Norman claimed the right to counsel at parole revocation hearings and brought a federal class action seeking injunctive relief. During the course of the appeal all criminal charges

were nolle by a state court as a result of which the named plaintiff no longer faced a parole revocation hearing. In view of this fact, in a per curiam decision, this court decided to dismiss the action without prejudice, "(s)ince it is clear that a named plaintiff cannot bring suit for a class of which he is not a part, Bailey v. Patterson 369 U.S. 31, 32-33, 82 S. Ct. 549, 7L.Ed2d512 (1962),..."<sup>2.</sup>

In order to properly be applied to the case at bar, the Norman decision would have to be greatly extended beyond the particular circumstances upon which that decision was made. In this case the court is faced with a significant class which is affected by the defendant's present procedures.

In LaReau v. Wesowicz 383 F. Supp. 214 (D. Conn. 1974) where a class action challenging conditions at a local prison was dismissed when the named plaintiff's were released or transferred from the prison in question, Judge Blumenfeld discussed why he reached a different decision in LaReau than he arrived at in Gatling .

That case (Gatling) is clearly distinguishable. It involved a challenge to a statute, not alleged unconstitutional conditions which could change over a period of time. Despite the mootness of her individual claim, the named plaintiff could be expected to have available to her the evidence necessary to support her claim.

383 F. Supp. at 218

Although this action is not a constitutional challenge to a statute it is a constitutional challenge to a long standing practice of denying hearings to which the considerations raised, by Judge Blumenfeld are equally relevant.

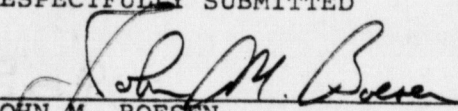


The defendant has not altered his position since the Frost decision and still steadfastly clings to the correctness of his position that current administrative procedures comply with due process. The question is primarily one of law and the named plaintiff has sufficient evidence to support his claim and the claim of the class. The issues have been litigated in this and other circuits and do not vary considerably if at all from one individual plaintiff to another. The named plaintiff is currently capable of properly representing the interests of all members of the class and was clearly involved in a bona fide controversy with Social Security when this action was commenced.

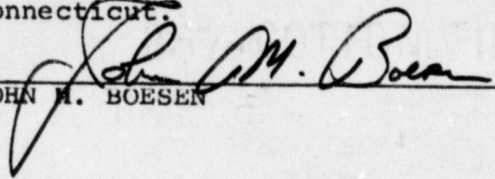
#### C O N C L U S I O N

The plaintiff respectfully requests that: this court reverse the decision of the lower court dismissing this action as moot with respect to the named plaintiff, reverse the decision of the lower court denying plaintiff's Motion for Certification as a Class Action, and remand this case to the District Court to proceed as a class action.

RESPECTFULLY SUBMITTED

  
JOHN M. BOESEN

This is to certify that a copy of the plaintiff's brief was mailed to Kenneth Davis, Assistant U.S. Attorney 915 Lafayette Blvd., Bridgeport Connecticut.

  
JOHN M. BOESEN



FOOTNOTES

1. 52. FRD.389 (D Conn) an indigent juvenile was permitted to sue on behalf of all those unable to appeal delinquent adjudications without payment of a filing fee even though the named plaintiff was permitted to appeal subsequent to the filing of the federal suit.

2. This case concerned a civil rights action brought by blacks to enjoin criminal prosecutions and enforce their rights to non-segregated services. Since none of the named plaintiffs alleged that they had been prosecuted or threatened with prosecution the Court therefore found that they never had standing to bring this action.

The following information was obtained from the files of the Department of the Interior, Bureau of Land Management, regarding the land grant to the State of California for the purpose of establishing a State University. The grant was made by the United States Government in 1850, and the land was located in the State of California. The grant was made to the State of California for the purpose of establishing a State University, and the land was located in the State of California. The grant was made to the State of California for the purpose of establishing a State University, and the land was located in the State of California.

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